

PIERCE ATWOOD**BRIAN M. RAYBACK**

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

P 207.791.1188
C 207.653.0717
F 207.791.1350
brayback@pierceatwood.com
pierceatwood.com

March 30, 2012

VIA ELECTRONIC MAIL

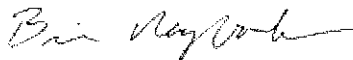
Susan M. Lessard, Chair
Maine Board of Environmental Protection
c/o Terry Dawson
17 State House Station
Augusta, ME 04333-0017

Re: Verso Bucksport LLC
Special Waste Landfill
#S-007713-WD-BB-A

Dear Chair Lessard:

Enclosed please find the Response of Verso Bucksport LLC to the appeal filed by Joseph and Michele Greenier challenging your decision to dismiss their appeal for lack of standing.

Sincerely,



Brian M. Rayback

Enclosure

cc: Nancy Macirowski, Office of the Attorney General
Cynthia Bertocci, Executive Analyst
Karen Knuuti, DEP
Joseph and Michele Greenier (via U.S. mail)
Steven Patch, Sevee & Maher
Jim Brooks, Verso Bucksport

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

APPEAL IN THE MATTER OF

<p>VERSO BUCKSPORT LLC BUCKSPORT, HANCOCK COUNTY, MAINE INCREASE IN LICENSED LANDFILL FINAL ELEVATION SPECIAL WASTE LANDFILL #S-007713-WD-BB-A (APPROVAL WITH CONDITIONS)</p>	<p>SOLID WASTE LICENSE AMENDMENT</p>
---	--

**RESPONSE OF VERSO BUCKSPORT LLC TO
APPEAL OF JOSEPH AND MICHELE GREENIER
CHALLENGING DISMISSAL FOR LACK OF STANDING**

Joseph and Michele Greenier challenge the Board Chair's ruling to dismiss their appeal of the license amendment granted to Verso Bucksport LLC ("Verso") for a vertical expansion of its special waste landfill in Bucksport, Maine. The Chair dismissed the appeal because the Greeniers failed to establish that they are aggrieved by the Commissioner's decision, and therefore that they do not have standing in this matter.

As will be discussed below, the Chair's decision to dismiss the Greeniers' appeal was correct and should be affirmed. The Greeniers have not shown that they will suffer a particularized injury as a result of the Commissioner's decision to grant Verso's application, and therefore they do not meet this threshold standard to file an appeal.

BACKGROUND

Verso applied to the Department for an amendment to its solid waste license for a landfill in Bucksport, Maine. The application proposed to increase the licensed final elevation of the landfill by 46 feet, to elevation 230 feet MSL. The project includes construction of a liner system on top of 24 acres of the existing landfill with leak detection and leachate collection.

This project will replace a prior horizontal landfill expansion project that was permitted by the Department in 2000, but never built.¹

After an in-depth review, the Commissioner granted Verso's application, with conditions. The Greeniers then filed a notice of appeal with this Board. Pursuant to the Department's rules, the Chair dismissed the appeal because the Greeniers' did not demonstrate that they are aggrieved by the Commissioner's decision. *See* 06-096 CMR 2 § 24(B)(1) ("If the Chair decides an appellant is not an aggrieved person, the Chair may dismiss the appeal."). As the Chair succinctly concluded in her letter dismissing the appeal:

While your appeal sets forth your concerns about past practice at the landfill and states your objections to the Commissioner's licensing decision, it does not contain evidence that would establish a potential injury particular to you. You do not reside in the vicinity of the project, and your general concerns about impacts to citizens of Maine as a whole from air and water pollution does not establish a right for you as individuals to appeal this particular licensing decision.

Letter from S. Lessard to Greeniers Dismissing Appeal, March 8, 2012, at 1.

The Greeniers challenge the Chair's decision by appealing the dismissal to the full Board.

ARGUMENT

"The right to appeal from an administrative decision is governed by statute." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 9. The statutory provision governing this case authorizes the Board to hear appeals "when a person aggrieved by a decision of the commissioner appeals that decision to the board." 38 M.R.S. § 341-D(4)(A). The Department's rules similarly provide that "an aggrieved person may appeal to the Board for review of the Commissioner's decision," and that "the written notice of appeal must include . . . evidence demonstrating the appellant's

¹ In 2000, the Department approved a 26 acre landfill expansion at this site. The expansion would have overlapped 15 acres on the northern side of the existing landfill and had a final elevation of 230 feet MSL. The current project will reach the same final elevation of 230 feet MSL as the expansion would have reached, and is therefore a vertical increase from the *existing* conditions only. Verso intends as a result of the current project to surrender the 2000 landfill expansion license. For more information, *see* Department Order #S-007713-WD-BB-A, at § 1.

standing as an aggrieved person.” 06-096 CMR 2 §§ 24(B)(1), 24(B)(2). An “aggrieved person” is “any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision.” 06-096 CMR 2 § 1(B).

The key, therefore, to being aggrieved is to show a “particularized injury.” That term is not defined in the Department’s rules, but the Maine Law Court has explained that it means an agency decision must have “operated prejudicially and directly upon the party’s property, pecuniary or personal rights,” and that “[t]he injury suffered must be distinct from any experienced by the public at large.” *Nelson*, 2008 ME 91, ¶ 10. In addition, the claimed injury must “genuinely flow[] from the challenged agency action,” and thus it must be clear that the decision being appealed caused the specific harm claimed by the appellant. *Id.* This makes sense because, pursuant to statute, a person aggrieved by a Commissioner decision may appeal only “that decision” to the board, and thus cannot use the appeals process to raise general concerns about a company or a site divorced from the particular licensing decision being appealed. 38 M.R.S. § 341-D(4)(A).

Accordingly, the Greeniers were obligated to provide evidence of how the Commissioner’s decision to allow a vertical increase of Verso’s landfill specifically harms their property, pecuniary, or personal rights, and thus that the issues they raise are not merely concerns shared by the general public. The Greeniers have failed to meet this basic threshold.

I. General Concerns About Pollution And Taxes Do Not Make The Greeniers Aggrieved Parties.

The Greeniers first raise general concerns over pollution at the landfill and the use of tax programs that support companies like Verso, stating

When corporations including Verso Bucksport, pollute[] the air we breathe and dump[] chemicals into the landfill(s) which contaminates the water supply, *then the citizens of Maine are all aggrieved persons.* In addition, as taxpayers we all

financially support Verso Bucksport th[r]ough BETR and TIF programs, *which makes all of us aggrieved persons.*

See Greenier Appeal, March 20, 2012, at 1 (emphasis added).

These kinds of generalized concerns, explicitly expressing an environmental or financial injury to the general public, are insufficient to establish standing. There is nothing specific to the Greeniers about these types of injuries, distinct from other members of the public, and thus they cannot raise them here. *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶¶ 18 (to be particularized, injury must be “distinct from the harm experienced from the public at large”). The Greeniers identify their address as Stockton Springs, more than four miles away from the landfill (and on the other side of the Penobscot River), and thus they do not even live in the same town as the landfill. Tellingly, they do not claim that they can see or smell the landfill, that it will affect their drinking water, or that they will experience any of the other kinds of injuries typically alleged by neighbors.

Likewise, the fact that they requested a public hearing on this application and provided comments to the Department staff shows only that they participated in the proceedings below. While that may be adequate to qualify as interested parties, it is not enough to show that they have suffered a particularized injury. Compare 06-096 CMR 2 § 1(I) (defining an interested person as one who merely submits written comments on, or requests receipt of materials about, an application) with 06-096 CMR 2 § 1(B) (defining an aggrieved person as one who suffers a particularized injury from a specific licensing decision).

II. Concern Over Events That Occurred Many Years Ago Does Not Make The Greeniers Aggrieved By The Licensing Decision At Issue Here.

The Greeniers also assert that Mr. Greenier was injured many years ago while he was employed at the mill. They state that Mr. Greenier drove trucks of ash and sludge to the landfill

and dumped barrels of chemicals into the landfill, and that these activities caused him health problems. *See Greenier Appeal*, March 20, 2012, at 1. As evidence, however, they provide only a document from a physician dated September 3, 1996, which states that Mr. Greenier should avoid heavy lifting or exertion and exposure to chemicals. *See Greenier Appeal*, Feb. 22, 2012, at Exhibit 10.

As an initial matter, it is not at all clear that the landfill caused the injury to Mr. Greenier that led to these restrictions, and the Greeniers do not say so explicitly.² More importantly, whatever the injury, it clearly occurred many years ago, and thus could not have been caused by the Commissioner's decision here. To be particularized, an injury must "genuinely flow[] from the challenged agency action," which in this case, is the decision to allow a vertical increase of the landfill. *Nelson*, 2008 ME 91, ¶ 10. Whatever the nature or cause of Mr. Greenier's health problems, they were not caused by the height increase authorized in this permit.

Finally, the Greeniers also claim that there were "other mill workers negatively affected by chemicals," and provide copies of a consent agreement and several newspaper articles about potential violations at the mills from as far back as 1990. *See Greenier Appeal*, March 20, 2012, at 1; *Greenier Appeal*, Feb. 22, 2012, at Exhibits 8B-9B. Again, the Greeniers must show that they are *personally* aggrieved, and therefore they cannot rely on injuries alleged to have been suffered by others. This is, therefore, not a basis for standing, either.

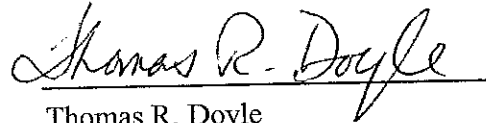
CONCLUSION

While the Greeniers have obviously been concerned about activities at the landfill for many years, they are not aggrieved by the Commissioner's decision here. Mere concern, as

² This is particularly unclear given that the two exhibits in the notice of appeal immediately following the physician's note relate to the failure of a synthetic web sling that occurred in a maintenance shop at the mill in 1992. *See Greenier Appeal*, Feb. 22, 2012, at Exhibits 11A & 11B. The implication is that this might somehow be relevant to Mr. Greenier's injuries, although that is not explained.

citizens, is not enough. Rather, they were required to demonstrate how the landfill license amendment would affect them, directly and personally. Because they failed to do so, Verso respectfully requests that the Board affirm the Chair's decision to dismiss the Greeniers' appeal.

Dated: March 30, 2012

A handwritten signature in dark ink, appearing to read "Thomas R. Doyle", is written over a horizontal line.

Thomas R. Doyle
Brian M. Rayback

Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorneys for Verso Bucksport LLC